Supreme Court, U.S.
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No. 98-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRIEDERIKE MONIKA ADSANI,

Petitioner,

vs.

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JEAN P. SASSON, WILLIAM MORROW AND COMPANY, INC., AVON BOOKS, THE HEARST CORPORATION, AND BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.

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QUESTION PRESENTED

Whether the Court should disturb the Second Circuit's decision that a Fed. R. App. P. 7 bond for "costs" may include attorney's fees when the underlying substantive statute (here, § 505 of the Copyright Act) allows fees "as part of the costs" on appeal, where

- there is no conflict among the circuits on that issue;
- the decision is consistent with this Court's holding in *Marek v. Chesny*; and
- petitioner, a foreign resident with no assets in the United States, submitted no credible evidence of financial hardship or inability to pay, and refused to pay the unsecured portion of the district court judgment awarding respondents substantial attorney's fees based on the dismissal of petitioner's "objectively unreasonable" copyright claim.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Bantam Doubleday Dell Publishing Group, Inc. ("BDD") is Bertelsmann Publishing Group, Inc., whose parent is Bertelsmann, Inc. Bertelsmann AG is the parent of Bertelsmann, Inc. BDD has no nonwholly-owned subsidiaries.

The Hearst Corporation ("Hearst") is a privately held company. Hearst owns a majority interest in Hearst-Argyle Television Inc., a publicly held subsidiary. William Morrow and Company, Inc., and Avon Books are units of Hearst, their parent company, and neither has any nonwholly-owned subsidiaries.

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OPINIONS BELOW

In addition to the opinions described in the petition, the district court's opinions granting summary judgment to defendants and awarding them attorney's fees are reported at 1996 WL 194326 (S.D.N.Y.) and 1996 WL 539780 (S.D.N.Y.).

STATEMENT OF THE CASE

By her petition, Adsani — a foreign resident with no assets in the United States — seeks to remove the Rule 7 bond requirement to allow her to take her merits appeal risk-free, that is, with no risk that any potential award of appellate attorney's fees, which are allowable "as part of the costs" under Section 505 of the Copyright Act, 17 U.S.C. § 505, could be collected.

The petition should be denied for four reasons. First, there is no split in the circuits on the issue of whether a Rule 7 bond may include attorney's fees in the circumstances here. The decision below appears to be the first court of appeals case to hold that anticipated attorney's fees can be included in an appeal bond for "costs" if the underlying substantive statute allows attorney's fees "as part of the costs" that are recoverable by the prevailing party on appeal. The two circuit court cases petitioner relies on do not involve such underlying statutes.

Second, the court of appeals decision is consistent with and relied on this Court's decision in *Marek v. Chesny* (similarly interpreting Fed. R. Civ. P. 68). Third, the court of appeals decision does not create an impermissible barrier to appeal, nor does it permit district courts to insulate their judgments from appellate review. The Rule 7 bond was not an abuse of discretion or a violation of Adsani's due process or equal protection rights, where: (1) the lower court found her copyright claim to be "objectively unreasonable;" (2) this Court has

expressly approved "objective unreasonableness" as a sound basis for awarding attorney's fees to a prevailing defendant under the Copyright Act; (3) Adsani, a foreign resident with no assets in the United States, had submitted no credible evidence of her inability to pay or her financial hardship; (4) she had neither paid nor bonded the nearly $58,000 balance of her judgment below; and (5) any Rule 7 bond would be applied as security only if she lost her merits appeal and if additional attorney's fees were awarded on appeal under the Copyright Act.

Fourth, Adsani's failure to post the Rule 7 bond and the consequent dismissal of her merits appeal moots the issue presented by her petition. In the time available to her before petitioning for certiorari, she did not seek a stay of the bond requirement from this Court. Following her pattern in the district court and the court of appeals, she made no effort to demonstrate to this Court that she lacked the financial resources to post the appeal bond. She has thus unjustifiably permitted the dismissal with prejudice of her merits appeal solely to dramatize her position on the bond issue.

A. The District Court

In her complaint, Adsani claimed that the copyrights in three manuscript versions of her unpublished autobiography titled *Cinderella in Arabia* or *Cinderella in Kuwait* ("Cinderella") were infringed by two books written by Jean Sasson: *Princess: A True Story of Life Behind the Veil in Saudi Arabia* ("Princess") (published in hardcover in 1992 by defendant William Morrow and in paperback in 1993 by defendant Avon Books, both units of defendant Hearst), and *Princess Sultana's Daughters* ("Daughters") (published in hardcover in 1994 and in paperback in 1995 by divisions of defendant Bantam Doubleday Dell). Adsani's "Cinderella" is an account of her life as a European woman who marries a Kuwaiti medical student while both are

in England, and the ordeal of her life as a Western woman living with her abusive husband and his family in Kuwait. "Princess" and "Daughters" are accounts of the life of a Saudi Arabian princess and her family. Adsani asserted a claim of copyright infringement against all defendants. She also asserted three state law claims: breach of fiduciary duty against Miller, her former literary agent (and his company, PMA Literary and Film Management, Inc.); misappropriation of ideas against Sasson and Miller; and unjust enrichment against all defendants (the dismissal of which was not appealed).

At the first pretrial conference (1996 WL 539780, *11-12 (S.D.N.Y.)), defendants asserted that Adsani's claims were utterly without merit and asked that Adsani, a foreign resident, be required to post a bond pursuant to Local Rule 39 (now 54.2) in an amount sufficient to cover the attorney's fees to which defendants might be entitled under *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The district court ordered Adsani to post a bond of $10,000, and she complied with no objection as to amount.

Adsani pressed for unlimited discovery. The defendants contended that the copyright and related claims were without merit due to the absence of substantial similarity between the works, and that a motion for summary judgment on this limited issue could dispose of the entire case (except for the breach of fiduciary duty claim). The district court stayed all further discovery, but undertook to read promptly one of the three versions of Adsani's manuscript as well as "Princess" in order to determine whether the stay should be lifted and discovery should proceed — as Adsani requested — during the briefing of the motion.

After reading "Princess" and a version of Adsani's manuscript that Adsani selected, the district court advised the

parties that it expected to grant defendants' anticipated summary judgment motion dismissing the copyright infringement, misappropriation, and unjust enrichment claims. Miller joined in their motion and later served a separate motion for summary judgment on the breach of fiduciary duty claim.

While the summary judgment motions were pending, the court, on defendants' motion, ordered Adsani to file an additional bond of $40,000 or a substitute bond of $50,000. Adsani complied. Although she opposed the increase, she did not do so on the ground of financial hardship.

The district court granted defendants' motion for summary judgment dismissing the copyright claim on the ground that, as a matter of law, there was no actionable similarity between Adsani's and defendants' works. 1996 WL 194326 (S.D.N.Y. 1996). It also dismissed the two related state-law claims as preempted by the Copyright Law. *Id.* at *15-17.

The district court held:

> In conclusion, the only similarities between these two books stem from the fact that each has a female protagonist living in a Middle Eastern country. Beyond that, they bear almost no relationship to each other.

The district court found that the works

> are not similar in mood, details, sequence, or characterization. . . . [T]he conclusion is inescapable that there is no substantial similarity between "Princess" or "Daughters" on the one hand and "Cinderella" on the other.

1996 WL 194326, *15.

Having compared the works in detail, the district court briefly summarized their striking differences:

> "Princess" and "Daughters" tell the story of a very privileged, wealthy woman [the pseudonymous Princess Sultana] from the highest social stratum married to a hard working, decent, enlightened husband. She is principally concerned about the lot of women in Saudi Arabia, a country she describes as having a deeply religious culture. Drawing on her life experiences, she relates anecdotes about the shocking treatment of other women in her country.
>
> In contrast, "Cinderella" is the biography of a European woman who is financially dependent on her abusive, unfaithful, alcoholic husband. She relates her personal struggle to survive in an alien culture for which she has little respect. Her struggle centers on the grotesque treatment she receives from her husband and her in-laws, bringing to mind the image of the fairy tale Cinderella's treatment at the hands of her step-mother and step-sisters. To preserve her mental health, she engages in various entrepreneurial projects, including opening a restaurant and a boutique. The country [Kuwait] she describes is preoccupied with consumerism and alcohol, rather than religion. Rather than being concerned with issues of feminism and human rights, she is concerned with fashion, table manners, social status, acquisition of wealth, and the way Kuwaitis treat foreigners. It is, in the final analysis, a deeply personal story of one woman's escape from a humiliating and degrading marriage, an escape made possible by her tremendous energy and indomitable spirit. The feminist issues that are at the

> core of "Princess" and "Daughters", such as female circumcision, are mentioned in passing simply as further examples of the backwardness of Arab culture.

Id.

Subsequently, the district court dismissed the entire complaint with prejudice (including the breach of fiduciary duty claim) and granted defendants' request for attorney's fees and other costs under Section 505 of the Copyright Act (17 U.S.C. § 505), finding that "plaintiff's copyright infringement claim was objectively unreasonable" and, further, that "an award of attorney's fees is appropriate in this case 'to advance considerations of compensation and deterrence' " (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. at 534 n.19). 1996 WL 539780, *16 (S.D.N.Y. 1996). The district court found: "that plaintiff's claim of substantial similarity was objectively unreasonable does not even present a close question." *Id.* at *14.

The district court awarded defendants their fees and other costs in the amount of $107,993.39 ($96,545.14 to defendants Morrow, Avon, Hearst, Bantam and Sasson, and $11,448.25 to the Miller defendants). Rejecting all of Adsani's arguments to mitigate the award, the district court stated:

> [G]iven the complete failure to provide any specific information regarding plaintiff's finances, nothing in plaintiff's declaration convinces me that an award in the amount requested by the defendants would work an undue hardship on the plaintiff.

1996 WL 539780, *17.

Adsani noticed an appeal from the judgment. Adsani's bonding company paid the $50,000 trial bond in partial satisfaction of the nearly $108,000 judgment, but she neither paid the remainder nor attempted to stay enforcement of the judgment by posting a supersedeas bond or seeking a stay without bond. Defendants requested the district court to require Adsani to file a bond, under Fed. R. App. P. 7, to ensure payment of "costs on appeal," in an amount sufficient to cover a potential award of additional attorney's fees to defendants under the Copyright Act if the dismissal of the copyright claim were affirmed on appeal. The district court ordered Adsani to file a $35,000 bond "to cover the costs of appeal and a possible award of attorney's fees associated with that appeal." Pet. App. 1a, 5a. The district court found

> such a bond necessary given plaintiff's failure to post a supersedeas bond and her lack of assets in the United States. Failure to require a bond may render any award of attorney's fees by the Court of Appeals, should it determine that such an award is appropriate, a nullity.

Id. at 4a-5a.

The district court stayed its order for two weeks to give Adsani time to comply or appeal. *Id.* at 5a. At the end of that two-week period, Adsani noticed an appeal and applied in the district court to extend the stay, which the district court denied.

B. The Court of Appeals

Adsani moved in the court of appeals to vacate the Rule 7 bond order or, in the alternative, to consolidate the appeal from the bond order with her appeal from the judgment on the merits, and to stay the bond order until determination of the consolidated

appeals. Defendants cross-moved to stay the appeal on the merits pending resolution of the appeal from the Rule 7 bond order. Following argument, the court of appeals unanimously stayed the merits appeal pending resolution of the appeal from the bonding order. January 17, 1997 Order.

On February 23, 1998, the court of appeals unanimously affirmed the district court's bond order. Pet. App. 6a-29a. The court of appeals held that a Rule 7 bond for "costs" may include an amount to cover potential attorney's fees on appeal if the underlying substantive statute, here Section 505 of the Copyright Act, allows attorney's fees "as part of the costs" that the prevailing party may recover on appeal. Pet. App. 11a-20a.

Rule 7 provides that a district court

> may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case.

Fed. R. App. P. 7. The court of appeals found that, while Rule 7 does not define "costs," neither is its definition supplied by Fed. R. App. P. 39, which refers to certain costs without explicit mention of attorney's fees. Rule 39 concerns the procedures and circumstances for taxing costs but does not define or limit appeal costs for Rule 7 purposes. The Copyright Act provides for the award of attorney's fees, including fees associated with appeals, to a prevailing party "as part of the costs." 17 U.S.C. § 505; *see, e.g., Twin Peaks Prods. Inc. v. Publications Int'l., Ltd.*, 996 F.2d 1366, 1383 (2d Cir. 1993) (Copyright Act authorizes award of fees for services on appeal as well as at trial level). Thus, the court of appeals held, Rule 7 "costs" can include attorney's fees because Section 505 of the Copyright Act allows attorney's fees to be awarded "as part of the costs."

The court of appeals held that *Marek v. Chesny*, 473 U.S. 1 (1985), was "very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7." Pet. App. 15a. In *Marek*, this Court interpreted "costs" in Fed. R. Civ. P. 68, which was not otherwise defined, to include all costs properly awardable under the relevant substantive statute. Thus, absent congressional expressions to the contrary, attorney's fees should be included as costs for purposes of Rule 68 where the underlying statute (there 42 U.S.C. § 1988) defines "costs" to include attorney's fees.

The court of appeals distinguished *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), on the same ground that *Marek* did, namely, that the statute in *Roadway* had its own pre-existing definition of costs that excluded fees. Pet. App. 18a-19a. The court of appeals found that Rule 7 does not have a pre-existing definition of costs any more than did Fed. R. Civ. P. 68, the rule interpreted in *Marek*. Pet. App. 18a. Inclusion of fees in a Rule 7 bond, the court held, did not contravene Rule 39 and was not inconsistent with 28 U.S.C. § 1920. To hold that those provisions provided the exclusive enumeration of costs would effectively read the words "as part of the costs" out of Section 505 of the Copyright Act (and many other statutes as well). Pet. App. 19a.

The court of appeals also held that its interpretation of Rule 7 was consistent with its purpose, namely, to protect prevailing appellees against the risk of non-payment of their appeal costs. Pet. App. 19a-20a. Excluding fees from Rule 7 costs would mean that the Rule would cover only a minuscule fraction of Adsani's potential liability for bringing her appeal. *Id.* at 20a. It would be anomalous, the court found, that copyright appellees (among others), unlike ordinary civil litigants, would be entitled to security on only a small portion of that which would be

theirs after a successful defense. *Id.* Nothing in the legislative history of Rule 7 shows that fees should be excluded. *Id.* at 21a.

The court of appeals also rejected Adsani's contention that the size or nature of the bond constituted an impermissible barrier to appeal or permitted district courts to thwart appeals from their own judgments. Pet. App. 21a-29a.

Any limitation on the right to appeal resulting from the requirement to post security did not violate due process or equal protection guarantees, because the requirement would not be applied to an appeal by a party financially unable to post the security. Pet. App. 24a-28a. Adsani offered no credible evidence in the district court of financial hardship or inability to pay, either in response to the imposition of the trial bond or in response to the attorney's fees motion, or even in response to the request for an appeal bond. The courts below found her unsupported, conclusory claims to be inadequate, especially for someone with no assets in the United States and who had incurred a $108,000 judgment that was partially satisfied only by the $50,000 trial bond she was required to post. *Id.* at 22a-23a, 27a-28a. Furthermore, her obligation to pay the judgment existed regardless of whether she appealed and was thus not a condition on her right to appeal. The Rule 7 bond was unrelated to the award of fees in the district court, but rather was based on potential additional liability she might incur on appeal. *Id.* at 27a-28a.

Moreover, the court of appeals noted that Adsani was required to pay attorney's fees in the district court because her case was found to be "objectively unreasonable," a ground endorsed by this Court as a sound basis for awarding fees to a prevailing defendant in a case under § 505 of the Copyright Act, *Fogerty*, 510 U.S. at 534 n.19. Pet. App. 28a. *Fogerty*

itself recognizes the important role of an award of § 505 attorney's fees in the statutory scheme of the Copyright Act, for prevailing defendants as well as prevailing plaintiffs. *Id.* at 26a.

The court of appeals observed that Rule 7 specifically entrusts to the district court's discretion the power to impose a Rule 7 appeal bond, thus necessarily implicating district court consideration of the merits of the appeal and the payment risk an appellant poses. Pet. App. 28a. Where Congress has enacted a statute including attorney's fees "as part of the costs" that may be taxed on appeal, the district court may consider those potential fees in determining the size of the bond. *Id.* Where, as in Adsani's case, there is no showing of financial hardship, there is no deterrent to appeal and no frustration of the review process. *Id.* at 28a-29a. Nor will the bond impose any payment obligation, unless Adsani loses her appeal and the court of appeals awards appellate fees. *Id.* at 28a.

On April 23, 1998, the court of appeals denied Adsani's petition for rehearing with suggestion for rehearing in banc. Pet. App. 32a. On June 2, 1998, it also denied her motion to hold her merits appeal in abeyance pending disposition of her petition for a writ of certiorari from the court's decision affirming the Rule 7 bond order. *Id.* at 33a. On July 1, 1998, the court of appeals ordered Adsani to comply with the bond order by posting a $35,000 security bond for appellate costs within 30 days of entry of its July 1, 1998 order, directing that Adsani's failure to do so would result in the dismissal with prejudice of her merits appeal. *Id.* at 33a-34a.

Adsani declined to post the appeal bond and permitted her merits appeal to be dismissed, claiming in her petition that she was "unable" to post the bond (Pet. 5) — contrary to the findings of the district court and court of appeals that she had submitted

no credible evidence of inability to pay or financial hardship. *See, e.g.*, Pet. App. 22a-23a, 27a, 28a. Adsani's July 21, 1998 petition for a writ of certiorari to review the Rule 7 bond order was not preceded or accompanied by any attempt to seek from this Court a stay of that order (or the order directing compliance or dismissal). Nor did Adsani seek to proceed in this Court *in forma pauperis* under Rule 39, which would have required the sort of financial disclosure she consistently evaded in the courts below.

On August 6, 1998, Adsani renewed her motion in the court of appeals to hold her merits appeal in abeyance and requested the court to vacate its July 1 order dismissing her merits appeal if she failed to post the bond within the 30-day period. Her motion was made about one week after the 30-day period had expired and about two weeks after her certiorari petition was filed. On August 12, 1998, the court of appeals denied Adsani's motion. Adsani has informed this Court that

> by the date this petition is considered, the appeal from the judgment will have been dismissed with prejudice for her failure to satisfy the lower court's bonding requirement.

Pet. 5-6. This brief (including in particular Point IV below) assumes the accuracy of her statement to this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SPLIT IN THE CIRCUITS ABOUT WHETHER A RULE 7 BOND FOR "COSTS" MAY INCLUDE ATTORNEY'S FEES WHEN THE UNDERLYING SUBSTANTIVE STATUTE ALLOWS FEES "AS PART OF THE COSTS" ON APPEAL.

This case appears to be the first court of appeals case to hold that potential attorney's fees can be included in a Rule 7 appeal bond for "costs" if Congress provided in the underlying substantive statute that the prevailing party may recover attorney's fees on appeal "as part of the costs."

Adsani relies on two cases that she contends create a split in the circuits on the issue: *In re American President Lines*, 779 F.2d 714 (D.C. Cir. 1985), and *Hirschensohn v. Lawyers Title Insur. Corp.*, 1997 WL 307777 (3rd Cir. 1997). While these cases discuss whether Rule 39 supplies the definition of "costs" for Rule 7, neither involves the effect of a separate underlying statute authorizing attorney's fees "as part of the costs" on appeal.

In *American President Lines*, the D.C. Circuit stated that the costs referred to in Rule 7 are those that may be taxed against a losing litigant under Appellate Rule 39, and do not include attorney's fees that may be awarded on appeal. 779 F.2d at 716. However, as the Second Circuit pointed out, the court cites no case law that directly supports this proposition. Moreover, unlike *Adsani*, there was no statute authorizing an award of attorney's fees "as part of the costs." Thus the holding in *American President Lines* merely follows the usual practice in the United States that a prevailing party is not entitled to recover attorney's fees as "costs" in the absence of a statute

allowing such an award. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Furthermore, the D.C. Circuit's analysis and conclusion in *American President Lines* are undermined by its failure to discuss *Marek v. Chesny*, 473 U.S. 1 (1985), which had been decided about six months earlier, and *Marek's* implications for interpreting "costs." Had the court considered *Marek*, it would have had to explain why *Marek*'s "plain meaning" rule applies to Fed. R. Civ. P. 68 but not to Fed. R. App. P. 7, and why *Marek*'s conclusion that "all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs' " does not apply to Rule 7. *Marek*, 473 U.S. at 9. The *American President Lines* case merely involved a potential award of fees under Fed. R. App. P. 38 (attorney's fees for frivolous appeals), a matter peculiarly within the province of a court of appeals, and not a substantive statute (like the Copyright Act) where fees may be awarded as part of the costs.

Finally, as the court of appeals pointed out below, *American President Lines* may have been modified or implicitly overruled by *Montgomery & Assocs. v. CFTC*, 816 F.2d 783, 784 (D.C. Cir. 1987), and thus may provide "an ambiguous precedent of little authority." Pet. App. 16a n.6.

In *Hirschensohn*, an unreported Third Circuit decision, the court, relying on *American President Lines*, found that Rule 7 costs are those that may be taxed under Rule 39. Finding that Rule 39 costs do not include attorney's fees, the court concluded that Rule 7 does not authorize a bond to cover estimated costs of attorney's fees. First, the court noted that attorney's fees were assessed under a Virgin Islands statute, not a federal statute. Second, the Third Circuit held that the Virgin Islands law "does not authorize assessment of counsel fees on appeal to this Court." 1997 WL 307777, *3. Given

this basis for its decision, it is not clear why the Third Circuit even needed to discuss the interplay between Rules 7 and 39. In any event, as the court of appeals stated below,

> *Hirschensohn* does not address the case where, as here, an independent federal statute explicitly authorizes attorney's fees 'as part of the costs' both at trial and upon appeal which permits a district court to order a Rule 7 appeal bond including such costs.

Pet. App. 17a.

Adsani incorrectly states, Pet. 5, that the court "acknowledged" a split in the circuits. On the contrary, the court of appeals observed that neither *American President Lines* nor *Hirschensohn* directly supports Adsani's case, nor does either case create a conflict among the circuits. Pet. App. 15a-17a. The court of appeals also noted that the only other circuit-level case touching upon the relationship between Rules 7 and 39 as to "costs," *Sckolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987) (per curiam), interprets Rule 7 to permit a bond that sought security for a possible sanction in the form of attorney's fees on appeal. "By implication, 'costs' under Rule 7 would not exclude attorney's fees as a blanket rule for that court." Pet. App. 17a.

Adsani's assertion that "[t]he leading treatises also conclude that costs under Rule 7 are limited to those taxable under Rule 39," Pet. 9 & n.6, is misleading. Apart from relying primarily on *American President Lines*, they — like that case — do not discuss (or cite) *Marek* or the effect of an underlying substantive statute that authorizes attorney's fees "as part of the costs" on appeal.

Nor is it relevant, as Adsani asserts (Pet. at 10 & n.8, and 11), that several circuit-level cases have ruled that Rule 39

costs do not include attorney's fees even when the underlying statute permits such an award. As the court of appeals found,

> they are irrelevant to our conclusion that [the] term "costs" under Rule 7 may include the definition of "costs" contained in the relevant substantive statute under which appeal is sought and are not limited by the enumeration of some "costs" found in Rule 39.

Pet. App. 20a n.9. These cases do not involve Rule 7 or address the issue of whether attorney's fees may be considered "costs" for Rule 7 purposes. Rather, most of these Rule 39 cases involve such issues as whether a motion for appellate attorney's fees must be made within the time limits of Rule 39(d) or whether a Rule 39 order that each party must bear its own costs on appeal precludes an award of attorney's fees.

There is no "split" or "disarray" in the circuits (Pet. 9) about whether a Rule 7 bond for "costs" may include attorney's fees when the underlying statute permits fees "as part of the costs" on appeal.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISION IN *MAREK v. CHESNY* THAT "COSTS" MAY INCLUDE ATTORNEY'S FEES.

The court of appeals correctly applied to this case this Court's opinion in *Marek v. Chesny*, 473 U.S. 1 (1985), concerning the relationship between "costs" and attorney's fees. Pet. App. 14a-15a, 18a. In *Marek*, this Court considered whether the cost-shifting provision of Fed. R. Civ. P. 68 permits a plaintiff in a civil rights suit to recover attorney's fees when he is the prevailing party but has obtained a judgment for less than the amount of defendant's Rule 68 offer of judgment.

This Court framed the issue as "whether the term 'costs' in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988." *Marek*, 473 U.S. at 7. The Court noted that a number of statutes, including 42 U.S.C. § 1988 and the Copyright Act, permit awards of attorney's fees "as part of the costs" and that the authors of the Federal Rules of Civil Procedure were well aware of these exceptions to the "American Rule" against including attorney's fees in costs. *Id.* at 8. Where the drafters did not define "costs" and there was no "explanation" of "its intended meaning in the history of the Rule," the Court gave the Rule its "plain meaning." *Id.* at 9.

> In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

Id.

This Court observed that

> [t]his "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.

Id. at 9. Similarly, a "plain meaning" interpretation of the interplay between Rule 7 and 17 U.S.C. § 505, construing "costs" in both provisions as including attorney's fees, is the

only construction that gives meaning to each word in both Rule 7 and Section 505. *See also, Hutto v. Finney*, 437 U.S. 678, 693-700 (1978) (treating civil rights attorney's fees as "costs").

Adsani relies on *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), for the proposition that the term "costs" does not incorporate an attorney's fees provision in the underlying statute when the term comes with its own statutory definition. *See Marek*, 473 U.S. at 9 n.2. Adsani argues that Rule 7 has, in Rule 39, a preexisting definition of costs; that Rule 39 excludes attorney's fees; and that Rule 7 must therefore exclude fees as well — even when the underlying statute in the case permits attorney's fees to be awarded "as part of the costs."

But, as the court of appeals held, "Rule 7 does not have a pre-existing definition of costs any more than Fed. R. Civ. P. 68, the rule interpreted in *Marek*, had its own definition." Pet. App. 18a. Neither the text of Rule 7 nor the Advisory Committee notes refer to Rule 39. Nothing in the text of Rule 39 or in the Advisory Committee notes states that Rule 39 contains the exclusive source of costs for Rule 7 purposes.[1] As this Court stated in interpreting the copyright fee statute in *Fogerty*, 510 U.S. at 524 n.11, "Congress clearly knows how to use mandatory language when it so desires." Similarly, if the drafters of Rule 7 had intended that Rule 7 "costs" be limited only to those costs identified in Rule 39, they certainly would have known how to use language mandating such a narrow definition of "costs."

Nothing in Adsani's labored and misleading discussion of the history of Rules 7 and 39 (Pet. 12-14) undercuts the court

1. Moreover, nothing in Rule 39 provides that it is the only source of appeal costs. In fact, Rule 39(a) begins: "Except as otherwise provided by law. . . ." *See* Pet. App. 17a-20a.

of appeals' discussion or conclusion that Rule 39 does not define or limit costs for Rule 7, and that Rule 7 costs can include attorney's fees because the Copyright Act (17 U.S.C. § 505) allows attorney's fees to be taxed "as part of the costs." Pet. App. 17a-21a. Where Congress has classified attorney's fees "as part of the costs," it must be presumed that it understood the implications of that classification for other statutes and rules relating to "costs." Moreover, the court of appeals' interpretation of Rule 7 is in keeping with Rule 7's purpose of protecting the rights of appellees against appellants such as Adsani who pose a payment risk. Pet. App. 19a-20a.

Attorney's fee awards to prevailing defendants in copyright infringement suits serve important public policies. In *Fogerty*, this Court stated:

> Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. In the case before us, the successful defense of "The Old Man Down the Road" increased public exposure to a musical work that could, as a result, lead to further creative pieces. Thus a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.

510 U.S. at 527.

The district court recognized these principles when concluding that defendants were entitled to attorney's fees for successfully defending against Adsani's objectively unreasonable infringement claims. 1996 WL 539780, *12-17 (S.D.N.Y.). The policies favoring attorney's fees awards to successful defendants also favor requiring an appellant such as Adsani to post a bond to secure appellate attorney's fees. Pet. App. 26a-28a. When the district court has found that it is "not even . . . a close question" that a plaintiff's claim was objectively unreasonable, prevailing defendants should be encouraged to continue their defense on appeal by offering them some assurance that they will be able to collect an eventual award of appellate attorney's fees. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 561 (9th Cir. 1996) (awarding attorney's fees on appeal to successful defendant "inasmuch as it served the purposes of the Copyright Act for Fogerty to defend an appeal so that the district court's fee award would not be taken away from him"). When the plaintiff (like Adsani) is a foreign resident with no assets in the United States, the justification for requiring an appeal bond is even greater.

The facts of this case demonstrate why Rule 7 costs should include attorney's fees when the governing statute includes fees as part of the costs. Excluding attorney's fees and limiting the bond to routine taxable costs would deprive Rule 7 of meaningful protection as a security-for-costs provision, because attorney's fees are by far the largest single element of costs. In such cases, the security offered by a cost bond that excluded attorney's fees could hardly be called "security" at all.

III.

RULE 7, AS INTERPRETED BY THE COURT OF APPEALS, DOES NOT IMPERMISSIBLY BURDEN THE RIGHT TO APPEAL OR FRUSTRATE THE REVIEW PROCESS.

The court of appeals correctly interpreted Rule 7, and Adsani is wrong when she contends that the ruling would permit district courts to create an impermissible financial obstacle to appellate review of their own decisions. Pet. App. 21a-29a.

As the court observed, the right of appeal may be limited by statute requiring, for example, the posting of security for expenses, including appellate counsel fees, without violating principles of equal protection or due process. Pet. App. 24a, citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 551-52 (1949). The court correctly found that

> without any showing of her financial hardship, the bond imposed on Adsani is not an impermissible barrier to appeal and Adsani's arguments to the contrary should be rejected.

Pet. App. 27a.

Adsani misstates the record when she claims that she "could not afford" to post a supersedeas bond or is "unable" to post the Rule 7 bond, or makes similar claims. Pet. 4, 5. Both the district court and the court of appeals correctly noted that Adsani "failed to adduce credible evidence of an inability to pay." Pet. App. 28a.

Adsani did not oppose the $50,000 trial bond on the ground that she could not afford to post it. (She was permitted,

without opposition, to file the $40,000 increase in two installments, but she did not oppose the increase on hardship grounds or provide any evidence of hardship.) On the attorney's fees motion in the district court, defendants noted in their reply brief that Adsani's opposition papers had made no claim that she lacked the financial ability to respond to a substantial fee award and that she had even acknowledged (her brief, p. 10) that she "has devoted considerable resources to the prosecution of this action" (including four trips from London to New York for court appearances, and her prompt compliance with the trial bond orders). As an afterthought, she filed a belated and conclusory sur-reply declaration. But it lacked any proof or documentation of income, assets or financial circumstances, and thus warranted the district court's finding that

> given [Adsani's] complete failure to provide any specific information regarding [her] finances, nothing in [her] declaration convinces me that an award in the amount requested by the defendants would work an undue hardship on [her].

1996 WL 539780, *17; Pet. App. 22a-23a.

Moreover, in the district court, Adsani did not oppose the Rule 7 appeal bond on grounds of financial hardship. In fact, defendants' counsel's November 6, 1996 letter to the district court expressly noted that "nothing in [Adsani's counsel's] letter [opposing the Rule 7 bond] remotely suggests anything about [Adsani's] financial situation." Despite that open challenge, Adsani still submitted no financial information in the nearly two weeks remaining before the district court's Rule 7 bond order. Not until the appeal of the bond order did her counsel claim "hardship" on her behalf, but again with no evidence. Yet, in her reply brief on the Rule 7 appeal (p. 19 n.7), Adsani

acknowledged that before suit she "engaged a person experienced in publishing to assist in locating relevant witnesses in the United States, Saudia [*sic*] Arabia and Kuwait."

Adsani has devoted substantial resources to this litigation and continues to do so on the bond appeal, and nothing in the record evidences that she lacks the financial ability to post the bond. She did not file a supersedeas bond or seek a stay of enforcement of the judgment on the ground that she could not afford such bond. As a foreign resident with no assets in the United States, Adsani apparently felt she could ward off enforcement. In short, in Adsani's case, the district court's Rule 7 order plainly did not "create a financial obstacle to appellate review of its own decisions." Pet. 6.

As the court of appeals found, where Adsani did not pay the nearly $58,000 of fees that the trial bond left unsecured, and

> where Adsani has no assets in the United States and failed to adduce credible evidence of an inability to pay, the district court did not abuse its discretion nor violate Adsani's due process rights in imposing an appeal bond of $35,000.

Pet. App. 28a.

The court of appeals correctly ruled that Adsani's failure to show financial hardship also undermined her argument that the district court prejudged the case's chances on appeal and thus interfered with the review process. Pet. App. 28a-29a. Any cost bond (with or without fees) would necessarily reflect some judgment that appellant's appeal lacks merit or that appellant poses a payment risk. Rule 7 specifically assigns to the district court the discretion to impose a bond. But without a showing of financial hardship, there is no deterrent to appeal,

and thus no frustration of the review process. Moreover, the bond is not a direction to pay anything. An appellant like Adsani would have to pay "costs" only if she lost on appeal *and* the court of appeals awarded costs. Thus a Rule 7 bond does not award fees or other costs, but only requires security in case they are awarded under other rules or statutes.

Rule 7 bonds pose no greater "obstacle" than other bonds that concededly are valid. The supersedeas bond requirement to stay enforcement of a judgment during an appeal, Fed. R. Civ. P. 62(d), is no "financial obstacle to appeal," even though appellants who cannot afford to post them are more likely to be vulnerable to bargaining away their appeal rights in order to avoid or mitigate enforcement of the judgment.

Analogous rules providing for security for costs in district courts have been held to permit requiring security for attorney's fees. *See, e.g., Montserrat Overseas Holdings, S.A. v. Larsen*, 709 F.2d 22, 24 (9th Cir. 1983); *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 36-38 (S.D.N.Y. 1989) (Southern District of New York Civil Rule 39, now Rule 54.2, provides for a "bond for costs" or "security for costs," and those costs may include attorney's fees where a statute such as 17 U.S.C. § 505 provides for them); *Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) (same). District courts have long administered trial bonds, with no suggestion that they have used them as "financial obstacles" to deter or frustrate litigation of cases in the first instance. Moreover, trial bonds are usually imposed early in the case *before* there has been any determination of the merits, whereas Rule 7 bonds are permitted only *after* an appeal is taken and the district court has become thoroughly familiar with the merits of the case being appealed.

Where Congress has made the judgment that attorney's fees may be awarded "as part of the costs" on appeal (e.g., Section

505 of the Copyright Act), the district court should be permitted to require security for those potential costs. It is only reasonable "for the amount of the bond to track the amount the appellee stands to have reimbursed." Pet. App. 20a, 28a.

IV.

DISMISSAL WITH PREJUDICE OF THE MERITS APPEAL RENDERS THE RULE 7 BOND ISSUE MOOT.

The court of appeals ordered Adsani to comply with the Rule 7 order and post the bond required for her merits appeal by the end of July 1998, and directed that her failure to do so would result in the dismissal with prejudice of her merits appeal. Pet. App. 33a-34a. She did not seek from this Court a stay of either the Rule 7 bond order or the order dismissing her merits appeal if she failed to post the bond. Instead, she declined to post the bond and thus her merits appeal has been dismissed with prejudice. Pet. 5-6. But the termination of the parties' principal controversy renders the Rule 7 bond issue moot. There is no need to post a bond as security for costs in a proceeding that has been finally terminated.

Adsani claims that the dismissal of the appeal for failure to post the bond raises no issue of mootness because she was financially "unable" to post it and the order imposing the bond was invalid. Pet. 5-6 & n.2. She is wrong.

As shown above (e.g., Point III), both the district court and the court of appeals found that Adsani had submitted no credible evidence of inability to pay or financial hardship. Adsani did not seek to proceed in this Court *in forma pauperis* under Rule 39, because that would have required financial disclosures of the kind that she steadfastly avoided in the courts below. She cannot now assert her inability to pay as the basis

for ignoring a court order when she failed at every level — district court, court of appeals, and this Court — to present any evidence to support that assertion.

Adsani has chosen to abandon her merits appeal rather than post the bond, despite knowing that her bond to secure defendants' appellate attorney's fees would not be at risk unless she lost the appeal and the court of appeals awarded those fees. She was prepared to risk a judgment for defendants' appellate fees only if it was unsecured and she was secure in the knowledge that, as a foreign resident without assets in the United States, the judgment was uncollectable. In short, Adsani was willing to appeal if it was risk-free for her and if the defendants were the only ones at risk.

Adsani deliberately chose to end her merits appeal before the final outcome of her bond appeal. In so doing, she voluntarily declined to post the bond that would have preserved her right to appeal from the judgment dismissing her complaint. She cannot now claim financial inability to comply with the bond order when the record is barren of any credible evidence to support that claim. In the circumstances of this case, termination of the merits controversy necessarily ends the bond controversy through mootness.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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